Supreme Court, U.S.
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No. 09-1242

In The

Supreme Court of the United States

DONALD W. BAIN, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY BRIEF

KENT A. SIMMONS
Attorney at Law
601 Brady Street, Suite 311
Davenport, Iowa 52803-5251
(563) 322-7784
(563) 323-9309 facsimile
ttswlaw@bigplanet.com

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1) Whether the Eighth Circuit is circumventing the rule of *Rita* by presuming the sentencing judge correctly understood and applied the law, when the record plainly shows the judge misstated and misunderstood the rule?

2) Whether the Eighth Circuit is circumventing the rule of *Gall* by creating its own preservation of error requirement that disavows the force of Rule 51(b) of the Federal Rules of Criminal Procedure?

3) Whether Judge Jarvey's sentencing was unreasonable because he erroneously concluded Section 2G2.2 enhancements were based upon careful study by the Sentencing Commission, and the enactment of those enhancements violated the Doctrine of Separation of Powers.

PARTIES TO THE PROCEEDING

Petitioner (Defendant and Appellant below):

DONALD W. BAIN, JR.

Represented by Kent A. Simmons,
Attorney at Law, 601 Brady Street,
Suite 311, Davenport, Iowa 52803

Respondent (Plaintiff and Appellee below):

THE UNITED STATES OF AMERICA

Represented by the Solicitor General

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
ARGUMENT	1
CONCLUSION	4

ARGUMENT

THE EIGHTH CIRCUIT IS CIRCUMVENTING THE RULE OF *RITA* BY PRESUMING THE SENTENCING JUDGE CORRECTLY UNDERSTOOD AND APPLIED THE LAW, WHEN THE RECORD PLAINLY SHOWS THE JUDGE MISSTATED AND MISUNDERSTOOD THE RULE.

If it were not such an oppressive sentence, the Eighth Circuit's opinion and the Government's position would be comical. The bottom line on that position is this: The judge knows he is not allowed to apply the presumption of reasonableness, but he goes ahead and mentions it without explaining why he is discussing an *appellate* standard. This position is a work of fiction that shows little creativity.

There are five reasons this Court cannot conclude Judge Jarvey was simply referring to an appellate presumption:

(1) A trial court judge has no reason to discuss an appellate rule *especially* if he knows he is not to use it;

(2) The judge interjected the rule in the middle of the defense presentation;

(3) The judge incorrectly characterized the *Rita* holding as saying the Sentencing Guidelines themselves are reasonable;

(4) The sentence he imposed was at the bottom of the calculated Guidelines range; and

> (5) The judge said the sentence was "sufficient," but he failed to state whether or not it was greater than necessary. (App. 60).

The Eighth Circuit relies on a presumption that Judge Jarvey "knows and applies the law," and presumes Judge Jarvey applied the law correctly. It is clear, however, that Judge Jarvey did not understand *Rita* correctly. The Eighth Circuit panel quoted everything Judge Jarvey said, but does not acknowledge this clear misunderstanding of the *Rita* decision:

> I can't do that. Hang on. In order to go below the Guidelines pursuant to 3553 which are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable, there's got to be a ground for a variance. (App. 52).

After also quoting Judge Jarvey on his later statement that "the Sentencing Guidelines are presumed reasonable," (App. 6), the Eighth Circuit panel simply ignores the meaning of the judge's plain language. The panel does not say Judge Jarvey was reading *Rita* incorrectly in stating "the Guidelines. . are presumed reasonable." The panel's explanation is: "these statements merely recognize that a sentence within the Guidelines range is presumed reasonable at the appellate level." (App. 7). What about the "Hang on. I can't do that." part? And speaking of the "Hang on, I can't do that." part, how can the Government make this conclusion:

> There is no indication that the district court wished to impose a lower sentence but felt legally constrained by petitioner's advisory Guidelines range from doing so. (Resp. Br. 11-12).

The Government's faulty conclusion then leaves out the "Hang on." part and only quotes "I can't do that." Respondent then argues that "I can't do that." simply suggests that the court did not see any basis for a downward variance in this case. (Resp. Br. 12). If that were true, why would the judge interrupt defense counsel before he was done to say "Hang on." If that were true, why would the judge state that conclusion before he has heard one word from Mr. Bain in allocution, and before he has heard the Government's position? If this were true, why did this Court bother to grant Certiorari after the Government made the same argument the last time around? (No. 08-820, Br. In Opp., 4/3/09, p.8).

The fact is, both the Government and the Eighth Circuit panel hold their ground as if there had been no prior Writ of Certiorari. Their positions have not changed in any way or to any degree. If they were correct in the first place, this Court would have seen no reason to grant the Writ.

CONCLUSION

In the interest of judicial economy and justice, the Court should grant the Writ and issue a summary decision directing the circuit court to remand the case for a new sentencing.

Respectfully submitted,

KENT A. SIMMONS
Attorney for Petitioner